



International Comparative Jurisprudence



THE INFLUENCE OF THE ENERGY CHARTER TREATY ON THE EUROPEAN ENERGY MARKET

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Abstract. This article provides an overview of the essential features of the Energy Charter Treaty (ECT). Keeping in mind that the European Union needs an efficient and integrated internal energy market, the paper analyses the ECT provisions related to both investment protection and problems of arbitration arising from these provisions. The objective of this article is also to present the most significant recent case law settled under the Energy Charter Treaty. The cases demonstrate the complexity of the problems related to ensuring ECT arbitration. Special attention is paid to the most recent CJEU case (*Slovak Republic v. Achmea* of 6 March 2018), analysing the investor state arbitration clauses in bilateral investment treaties (BITs) and the implications of this judgment on the energy sector. Although, according to the *Vattenfall* case, the *Achmea* case did not affect the jurisdiction of tribunal under the Energy Charter Treaty, this article reflects the challenges that might be expected in the future.

Keywords: European energy market, Energy Charter Treaty, investments, arbitration, *Achmea*, *Vattenfall*

Introduction

The European Union needs a functioning and integrated internal energy market. In order for the market to operate in that manner, investments in infrastructure and protection of these investments are necessary. The protection of investments is governed by specific acts, including the Energy Charter Treaty (ECT) and bilateral investment treaties (BITs) concluded between different countries.

Not only does this paper present the current problems in the energy market, particularly problems involving protection investments in this market, but it also makes an attempt to answer the following question: has the judgment in *Slovak Republic v. Achmea* of 6 March 2018 changed only the future of EU-internal BITs or maybe also the role of the ECT?

The first part of this paper will provide an overview of the general situation in the European energy market and discuss the accompanying problem that needs to be solved. It will also present a general outline of the international legal standards relating to the energy market.

The second part will deal with legal provisions of the ECT and the treaty's impact on protecting investments. The paper will present the latest cases settled on the basis of the ECT and discuss the issues presented in the cases *Charanne* and *Eiser* cases, which relate to the modification of renewable energy support schemes under the Energy

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Charter Treaty. The judgment in the *Slovak Republik v. Achmea* case and its implications for the energy sector will also be presented and analysed.

The analysis is based on theoretical and empirical methods, especially on the textual, contextual analysis of the judgements.

1. The European energy market

The internal energy market consists of open and competitive energy markets in the member states. It aims to create new economic possibilities and increase the level of cross-border trade to achieve higher efficiency and better quality of services, and to ensure the security of supply. The development of the internal energy market is also significant in view of possible price reductions, with energy costs constituting a vast part of variable costs in many industries.

The “internationalisation” of national energy markets is further facilitated by the liberalisation of the European market. Creating a free energy market is one of the goals of the European Union’s energy policy. This represents a way to achieve a satisfactory level of competitiveness with a high concentration and integration of energy industries in all member states. Market liberalisation is expected to energise entities, encourage entrepreneurship and to invite private businesses to participate. However, this liberalisation² is a complex and difficult process (Tönurist, Besten and Paplaityte, 2015)³.

The operation of the market is in line with regulations to ensure the free flow of energy across the EU without any technical or regulatory barriers. A uniform set of principles has not been specified in legislation or doctrine. However, looking at the approach expressed in doctrine and the practical operation of the energy market, it is possible to define certain patterns (Nowacki, 2012; Nowacki, 2010; Nowak, 2009)⁴, such as the principle of third-party access, unbundling (including unbundling of accounting, management and ownership, and legal unbundling), the right to choose an energy provider, end-user protection and independence of energy market regulators.

It should be noted that all countries within the European internal market are required to meet the objectives of the climate and energy strategy⁵ – namely, cutting greenhouse gas emissions; maintaining a share of at least 27% for renewable energy consumption; achieving an energy efficiency improvement of at least 27%; and supporting the completion of the internal energy market by achieving the 10% electricity interconnection target and connecting energy islands to the market. To achieve these objectives, new investments are necessary.

² The EU market operates pursuant to the provisions set forth in EU legislative acts, especially: Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ L 211 of 14.08.2009, p. 15, further Regulation 714/2009); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211 of 14.08.2009, p. 36, further Regulation 715/2009); Directive No 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive No 2003/54/EC (OJ L 211 of 14.08.2009, p. 55, further Regulation 2009/72); and Directive No 2009/73 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive No 2003/55/EC (OJ L 211 of 14.08. 2009, p. 94, further Directive 2009/73).

³ See more about market liberalisation in each country in Tönurist, P. et al. (2015).

⁴ The principles of the internal market are discussed by Nowacki, M. (2012, 2010) and Nowak, B. (2009).

⁵ These objectives were approved by the European Council in a meeting on 23 October 2014.

The operation of the internal market is ensured by the creation and development of trans-European energy networks⁶. These networks⁷ are built to ensure the rational use of EU energy resources, which in turn leads to market growth. Modern energy infrastructure based on energy networks is designed to leverage the differences in access to infrastructure between different areas of EU, as well as to link peripheral areas, islands and closed regions with central areas, and as a result to facilitate the sustainable development of the whole EU area (Jas, 2011). Creating an accessible energy grid will ensure greater security of supply, increased energy efficiency, and effective operation of the internal market.

The development of a common European energy market is aimed at supporting growth of the regional energy markets. One of the main steps towards building such markets was to draw up a plan and schedule for implementation of a coordinated market mechanism for sharing transmission capacities within intra-system exchange on short-term markets.

2. International legal standards relating to the energy market

The energy market is governed also by international law standards that determine, inter alia, relations between countries and investors in terms of international energy trade, energy investments, and ensuring the security of energy supplies. These standards include general international regulations for trade, transit and investment protection⁸, as well as clauses directly related to the energy sector.

Several of the provisions concerning the energy market are prescribed by bilateral agreements and the obligations arising from those documents. It should be pointed out that legal acts regulating the energy sector often take the form of “soft law”. How does this affect the application of standards and rules in international energy law? Do the current instruments include any guarantees with regard to the implementation of investment processes in the energy industry, energy trade, and the required levels of competitiveness?

In terms of the energy trade, the legal basis consists of the provisions of the General Agreement on Tariffs and Trade (GATT) (available at: https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf), which are binding since the WTO agreement incorporating the GATT provisions came into force. Apart from energy trade, the international energy market also covers energy services. The rules for providing services relating to the energy industry have been defined in the General Agreement on Trade in Services (GATS). However, there are no separate provisions for the energy sector, and the application of these terms depends on countries’ obligations and the content of the appendices. GATS provisions regulate trade in services in various sectors of the economy and affect energy services.

In analysing international legal standards, the text and role of the International Energy Charter (IEC)⁹ should be referenced. This is a political declaration of intention aimed at strengthening energy cooperation between the

⁶ The term “trans-European energy networks” suggests that these structures are built and developed across borders. However, it should be pointed out that cross-border networks include not only translational links, but also national networks operating internationally. See: Geigner, R., Khan, D.E., Kotzur, M. (2010); and Calliess, C., Ruffert, M. (2007).

⁷ The integrated and reliable energy networks, according to a Commission communication of 17 November 2010 titled ‘Energy infrastructure priorities for 2020 and beyond – a blueprint for an integrated European energy network’, are not only required by the EU economic strategy, but are also a condition for implementation of the EU energy policy goals (*Energy infrastructure priorities for 2020 and beyond – A Blueprint for an integrated European energy network* COM(2010), 2010).

⁸ i.e. GATT/WTO.

⁹ It should be indicated that signing the International Energy Charter does not oblige countries to sign the Energy Charter Treaty (about the Energy Charter Treaty in a further part). However, the International Energy Charter seeks to encourage countries that are not members of the Energy Charter Conference to sign the ECT. Differences between the Energy Charter Treaty and the International Energy Charter:

- The Energy Charter Treaty was primarily considered a European initiative despite its membership outreaching Europe. Meanwhile the International Energy Charter is intended for global use.

signatory countries¹⁰. The IEC expresses the most topical energy challenges of the 21st century¹¹ and its main objectives are as follows: supporting the modernisation of the Energy Charter Process (<http://www.energycharter.org/process/overview/>), creating a governmental platform to address contemporary energy challenges, and contributing to solid global energy governance by facilitating new accessions to the Energy Charter Treaty without containing any obligations in this respect (International Energy Charter, 2015). The signing of the International Energy Charter brought a number of positive outcomes. According to the signatories, the benefits for newcomers can be divided into three groups. From a strategic point of view, we can distinguish the following: the security investment framework used by the IEC for its own foreign trade and investment initiatives, accessibility to a broad network of relationships and strategies, regional energy cooperation, and the enforced market structure. The practical benefits include the right to initiate the energy Early Warning Mechanism, using the set of model agreements; an IEC signature does not oblige the country to carry out further actions, but opens up the possibility for future accession to the ECT and members with observer status are allowed to participate in Energy Charter activities such as meetings and training programmes. On the political side, there is the chance to provide a reassuring message to potential investors and become part of an established international framework for long-term energy cooperation (Energy Charter Process, 2015). There are also special benefits for the “old signatories”. From a political point of view, it is worth considering the following: an Energy Charter declaration offers enhanced means of energy governance, and offers the chance to improve cooperation and communicate clearly to newcomers the importance of the energy charter process (Energy Charter Process, 2015).

From a strategic perspective, the IEC reflects new developments and challenges found in current energy markets and brings fresh opportunities to new markets thanks to IEC principles on the liberalisation of energy trade. The practical influence is expected to be more global, not only enhancing the security of the investment framework in Euro-Asia, but also lead to improvements in global energy cooperation.

Nonetheless, certain restrictions must not be forgotten. For example, depending on the regional political situation, the governments of some states may face a disadvantage in that ECT claims are not governed by the domestic laws but by the ECT provisions and the regime of international law.

It is undeniable that “the European Union needs a fully functioning, interconnected and integrated internal energy market” (European Council conclusion of 4 February 2011, EUCO 2/1/11, p. 1). For the internal market to operate in that manner, investments in infrastructure and investment protection are necessary. As far as relations with third countries are concerned, the protection of investments is governed by international energy law, in particular the Energy Charter Treaty and bilateral investment treaties concluded between specific countries¹².

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- The International Energy Charter maps out common principles for international cooperation in the field of energy. However, it should be mentioned that it does not bear any legally binding obligation or financial commitment. The International Energy Charter was meant to be a “soft law” encouraging more members to join the ECT.

¹⁰ The International Energy Charter was formally adopted and signed at the Ministerial Conference hosted by the government of the Netherlands in May 2015. See commentary on the International Energy Charter (2015). The Charter is a modern version of its predecessor, the European Energy Charter (1991).

¹¹ In particular: summary of documents and agreements on energy, including the Energy Charter; the growing importance of developing countries for global energy security over the past two decades and the synergies between energy-related multilateral fora; difficult choices between the three options of energy security, economic development and environmental protection; enhanced energy trade in view of sustainable development; the importance of increasing awareness and the need to promote access to modern energy services, clean technology and capacity building, and reduce energy poverty; the need to diversify sources of energy and supply routes; and the importance of regional integration of energy markets.

¹² It should be noted that the Lisbon Treaty introduced changes that extended the exclusive competence of the European Union over commercial policy to include foreign direct investment, which shall result in harmonisation of BITs concluded within the EU. This issue will be discussed in more detail later.

3. The Energy Charter Treaty (ECT)¹³

An international agreement that defines the legal framework for promote long-term cooperation in the energy sector between signatory countries is the Energy Charter Treaty and, further, the Energy Charter Protocol on Energy Efficiency and Related Environmental Factors (The International Energy Charter Consolidated Energy Charter Treaty with Related Documents). These were made in Lisbon on 17 December 1994 and entered into force in April 1998. The treaty is a multilateral international agreement.

The ECT was signed by all EU member states individually and the EU as a whole institution. Each signatory can individually withdraw from the treaty in accordance with its Article 47 of the treaty. This was an opportunity that Italy took: the Ministry of Economic Development (*Ministero dello Sviluppo Economico*) stated that high costs relating to participation in international organisations meant that Italy had to withdraw from the treaty (Parola, Petronio and Cozzi, 2015). It is possible that Italian energy policy is not fully in line with the requirements defined in Article 26 of the ECT. Pursuant to that article, an investor is free to choose the available forum for asserting claims before the courts or administrative tribunals of the ECT host state, in accordance with any previously agreed applicable dispute settlement procedure, or before an international arbitral tribunal. It should be emphasised that the ECT does not require the investor to exhaust local remedies in the courts of the ECT host state under the domestic law. Likewise, following withdrawal from the treaty, Italian courts may prioritise their national interests. However, in withdrawing from the ECT, Italy will not be able to avoid the agreed arbitration fora.

The Energy Charter Treaty ensures the protection of investments (including protection of foreign investments based on the extension of national treatment or most-favoured-nation treatment, and protection against key non-commercial risks), non-discriminatory conditions for trade in energy materials, products and the promotion of energy efficiency, and the reduction of the environmental impact of energy production. The treaty regulates not only trade and investments, but also transit, competition and procedures for dispute resolution. It also sets out provisions on transparency, sovereignty, taxation and the environment. Under the ECT, contracting parties should work to promote access to international markets on commercial terms and, in general, to develop an open and competitive market for energy materials and products, as well as energy-related equipment (Article 3 of the Energy Charter Treaty).

It should be noted that the Energy Charter Treaty grants protection only to investments in the energy sector. Taking account of the definition of economic activity¹⁴ in the energy sector provided by the treaty, it should be considered whether the construction of energy infrastructure is also subject to such protection. Although the definition of economic activity in the energy sector does not include the construction of this infrastructure – and only mentions its operation – the Final Act of the European Energy Charter Conference (EU Official Journal of 1994, No. 380, p. 3) provides that construction of energy infrastructure states is subject to such protection.

When analysing the Energy Charter Treaty, it needs to be noted that numerous provisions constitute performance obligations rather than obligations for specific actions. For example, Article 3 of the treaty states that the “Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products and Energy-Related Equipment”. Moreover, Article 19 of the treaty provides that each contracting party should strive in an economically efficient

¹³ The beginnings of the Energy Charter date back to a political initiative launched in Europe in the early 1990s. The European Energy Charter declaration was signed in The Hague on 17 December 1991. This was a political declaration of principles for international energy, including trade, transit, and investment, together with the intention of negotiating a legally binding act, which laid the foundations for development of the Energy Charter Treaty.

¹⁴ Article 1 item 5 of the Energy Charter Treaty defines “economic activity in the energy sector” as meaning “an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of energy materials and products except those included in Annex NI, or concerning the distribution of heat to multiple premises”.

manner to minimise harmful environmental impacts occurring either within or outside their area from all operations within the energy cycle in their area, taking proper account of safety.

The ECT conveys the main WTO principles adjusted to the energy market. The adoption of WTO provisions made it possible to build a transparent, stable, predictable and non-discriminatory environment for energy turnover. In line with the ECT, contracting parties must promote and create stable, favourable and transparent conditions for foreign investors and apply the most-favoured-nation principle or offer the same treatment given to national investors – whichever is the most favourable. Meanwhile, trade in energy materials and products between contracting parties is governed by GATT rules. Under Article 4 of the ECT, no content of the treaty, as between particular contracting parties that are members of the WTO, should derogate from the provisions of the WTO agreement as they are applied between those contracting parties.

The ECT offers a wide range of dispute-resolution mechanisms, including state-to-state arbitration (with specific procedures for competition and environmental issues), WTO-based dispute mechanisms for trade, conciliation procedures for transit, a new early warning mechanism, and the well-known and increasingly used investor-state dispute settlement (ISDS) clause. It should be noted that resolution of disputes between countries based on the Energy Charter Treaty is almost unheard of¹⁵, because countries prefer to settle their disputes through diplomatic means. The provisions of the ECT are mainly applicable to disputes between a country and an investor. Article 26 of the treaty regulates the settlement of disputes between an investor and a contracting party. Item 8 of the article indicates that “the awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards” (Art. 26 item 8 of the ECT).

4. Cases settled on the basis of the ECT

The Energy Charter Secretariat maintains an updated list of investment dispute settlement cases (on 28 of October, the total number of ECT cases was 119)¹⁶. The first ECT case was registered in 2001. It has been noted that between the years 2011 and 2017, there was a boom in investment arbitration cases concerning renewable energy sources. The modification of RESs in some European countries was followed by international investor-state arbitration claims under the ECT. Most of these claims were against Spain. This paper evaluates the cases of *Charanne* and *Eiser* (Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017) in light of existing general practices on expropriation and fair and equitable treatment. Both cases picture the conflict between the state’s right to regulate and protections for the investor under international investment agreements.

4.1. Investment cases (Charanne and Eiser) settled on the basis of the ECT

A. The Charanne case

A case brought by investors under the Energy Charter Treaty was *Charanne v. Spain* in 2016¹⁷. This was initiated by two claimants, Charanne B.V. and Construction Investments S.à r.l., both shareholders in a company dedicated to the generation and sale of electricity produced by photovoltaic solar plants. More specifically, the dispute concerned regulatory changes by Spain with regard to national systems based on photovoltaic solar electricity.

¹⁵ An example of a dispute between countries is that between Slovenia and Croatia, which was eventually settled by diplomatic means.

¹⁶ List of all Investment Dispute Settlement Cases. Available at:

<https://energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/>

¹⁷ More about the case i.a.: Simoes, F. D. (2017); Restrepo, T. (2018).

The claimants argued that Spain breached the prohibition of expropriation (Article 13 ECT¹⁸), the fair and equitable treatment standard (Article 10.1 ECT¹⁹) and the duty to provide investors with effective means to defend their rights (Article 10.12 ECT²⁰) (*Charanne v. Spain*, para. 277). Spain replied to these claims by affirming that the regulatory changes were reasonable changes carried out in the public interest and in a non-discriminatory manner, proportionate to the interests they aimed to protect and in compliance with due process (*Charanne v. Spain*, para. 337). Spain also argued that it had neither expropriated the claimants' investment (*Charanne v. Spain*, para. 339-346), nor violated the obligation to provide fair and equitable treatment (*Charanne v. Spain*, para. 347-368) and the obligation to provide investors with effective ways to assert their rights (*Charanne v. Spain*, para. 369-372).

The claim was dismissed by the tribunal, noting that legitimate expectations could not amount to freezing the regulatory framework. The tribunal recognised that legitimate expectations enjoy investment protection. It referred to the good faith principle of customary international law that "a state cannot induce an investor to make an investment, hereby generating legitimate expectations, to later ignore the commitments that had generated such expectations" (*Charanne v. Spain*, para. 486). According to the tribunal, Spain had made no direct promises to the investor. There were no stabilisation clauses or other agreements about it (any special commitment) (*Charanne v. Spain*, para. 490). The standards that established a remuneration regime for the production of renewable energy were by no means comparable to direct agreements with the foreign investor. The tribunal stated in the judgment that "finding that there has been a violation of investor expectations must be based on an objective standard or analysis, as the mere subjective belief that could have had the investor at the moment of making of the investment is not sufficient" (*Charanne v. Spain*, para. 495). In addition, the tribunal mentioned that the claimants should have carried out an analysis of the legal framework for the investment, with regard to expectations on the basis of the law and the factual situation prevailing in the country. The arbitral tribunal considered that in this case, the claimants could have easily foreseen possible adjustments to the regulatory framework (*Charanne v. Spain*, para. 505).

They, however, indicated that the referees declared that the absence of a concrete promise does not preclude a violation of the standard of fair and equitable treatment. With regard to this possibility, the tribunal expressed that "an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the state will not act unreasonably, disproportionately or contrary to the public interest" (*Charanne v. Spain*, para. 514). After a detailed analysis of the facts, the arbitrators came to the conclusion that

¹⁸ According to Article 13.1 ECT: (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

¹⁹ According to Article 10.1 ECT: Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.

²⁰ According to Article 10.12 ECT: Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations.

measures taken by Spain did not violate this fundamental expectation²¹. Nonetheless, the judges found that the “new regulation” did not breach the standards of protection contained in the ECT (*Charanne v. Spain*, para. 539). Those rules received limited amendments to the regulatory framework that existed at the time of the investment without eliminating its essential characteristics.

B. Eiser case

The second case to be discussed based on the Energy Charter Treaty was *Eiser Infrastructure Ltd. et al. v. Kingdom of Spain*²². The case was initiated by the two claimants Eiser Infrastructure Limited, a limited liability company incorporated under the laws of the United Kingdom, and Solar Energy Luxembourg S.à.r.l., a limited liability company, both incorporated under the laws of Luxembourg. The arbitral tribunal constituted that under ICSID rules, it was tasked with striking a balance between Spain’s right to regulate and the claimant investors’ right to be treated equitably and fairly. More specifically, it referred to the dispute concerned regulatory changes by Spain (caused by the European Union²³) in the national renewable energy scheme. Spain installed a regulatory regime for the promotion of renewable energy sources (RES), establishing a system of premiums and feed-in tariffs in order to provide a reasonable rate of return on investments in RES²⁴. It should be noted that the claimants acquired shares in concentrated solar power plants under these circumstances.

Unfortunately, the support scheme led to investments that exceeded governmental expectations. When the tariff deficit²⁵ became unbearable for Spain, the law was amended. Spain conducted a comprehensive reform to the electricity market that replaced the existing feed-in tariff system with a remuneration system guaranteeing a yearly rate of return. Under these circumstances, claimants were economically disadvantaged by the regulatory change.

The claimants submitted that the measures taken in Spain’s reform of the electricity sector violated obligations under the ECT, precisely the first sentence of Article 10(1). The tribunal held that: “The ECT did not bar Spain from making appropriate changes to the regulatory regime of RD 661/2007. Thus, the Tribunal does not accept Claimants’ contention that RD 661/2007 gave them immutable economic rights that could not be altered by changes in the regulatory regime. Nevertheless, the ECT did protect Claimants against the total and unreasonable change that they experienced here” (*Eiser v. Spain*, para. 363).

In this judgment, the tribunal supported its interpretation of Article 10 of the ECT with a detailed explanation of the contract’s purposes (legal stability and transparency). The arbitral tribunal therefore carried out the following statement: “Taking account of the context and of the ECT’s object and purpose, the tribunal concludes that Article 10(1)’s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve” (*Eiser v. Spain*, para. 371). The tribunal stated that Spain had introduced a new system that violated the fair and equitable treatment standard under Article 10(1) of the ECT. Furthermore, it considered that Spain, by introducing the new RES regime, violated Article 10(1) by breaching the claimants’ legitimate expectations based on the prior regime.

²¹ According to para. 517: As for proportionality, the Arbitral Tribunal considers that this criterion is satisfied as long as the changes are not capricious or unnecessary and do not amount to suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework.

²² The case was registered on 23 December 2013 with the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID), requesting for the institution of arbitration proceedings (ICSID Case No. ARB/13/36, 2017).

²³ In 2001, the European Community adopted Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

²⁴ The remuneration was based on the quantity of electricity generated. RES generators also have a priority dispatch over conventional generation.

²⁵ The difference between the subsidy paid to the producer and the revenues generated from customers.

Regarding the *Eiser v. Spain* judgment, one should refer to the European Commission's Decision of November 2017 – Spain: support for electricity generation from renewable energy sources, cogeneration and waste (State aid SA.40348 (2015/NN)). In this, the European Commission points to the fact that enforcement of the judgment would constitute a case of unlawful public aid. It should be noted that the European Commission made its own assessment of the *Eiser* arbitration judgment, deciding that there was no breach of fair and equitable treatment²⁶, while EU law and settlement procedures take precedence before the ECT and other bilateral investment treaties. According to paragraph 165 of SA.40348 (2015/NN): “The Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself state aid. However, the Arbitration Tribunals are not competent to authorise the granting of state aid. That is an exclusive competence of the Commission. If they award compensation, such as in *Eiser v Spain*, or were to do so in the future, this compensation would be notifiable state aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation.”

4.2. The end of BIT-related dispute resolution by arbitration tribunal? Case: Slovak Republic v. Achmea BV

On 6 March, 2018 the Grand Chamber of the Court of Justice issued a judgment in case C-284/16, *Slovak Republic v. Achmea BV* (Judgment of the Court, 6.03.2018, *Slovak Republic v. Achmea*, Case C 284/16). Replying to a request for a preliminary ruling from the German Federal Court of Justice, the Court of Justice assessed the compatibility with EU law of the provisions of the international agreement between Slovakia and the Kingdom of the Netherlands on encouragement and reciprocal protection of investments (BIT)²⁷. Pursuant to Article 8 of this treaty, if parties failed to reach an agreement in disputes between a state party to the treaty and an investor from the other state, these would be resolved by arbitration tribunals, to the exclusion of courts of the given state.

In this case, a dispute between Slovakia²⁸ and a Dutch company concerned the redressing of a loss caused by amendments to Slovak laws (*Slovak Republic v. Achmea*, para. 23.)²⁹. The dispute was referred to as a resolution by an arbitration tribunal in Frankfurt, according to German procedural law. Slovakia challenged the final arbitral award before a German court. When Oberlandesgericht Frankfurt am Main (the Higher Regional Court in Frankfurt am Main, Germany) dismissed the action, the Slovak Republic appealed against the dismissal on a point of law to the Bundesgerichtshof (Germany's Federal Court of Justice) (*Slovak Republic v. Achmea*, para. 12). The German court had doubts about the consistency of the procedural rules provided for in the BIT with EU law. In

²⁶ According to para. 164 of State aid SA.40348 (2015/NN): “In any event, there is also on substance no violation of the fair and equitable treatment provisions. As explained above at section 3.5.2, in the specific situation of the present case Spain has not violated the principles of legal certainty and legitimate expectations under Union law. In an intra-EU situation, Union law is part of the applicable law, as it constitutes international law applicable between the parties to the dispute. As a result, based on the principle of interpretation in conformity, the principle of fair and equitable treatment cannot have a broader scope than the Union law notions of legal certainty and legitimate expectations in the context of a State aid scheme. In an extra-EU situation, the fair and equitable treatment provision of the ECT is respected since no investor could have, as a matter of fact, a legitimate expectation stemming from illegal State aid.”

²⁷ It should be noted that with this judgment, the CJEU decided not to follow Advocate General Wathelet in his opinion of 19 September 2017, in which he had proposed to the CJEU to rule that EU law did not preclude the application of an investor-state dispute settlement mechanism (“ISDS”) established by means of a BIT between two EU member states.

²⁸ As a successor State to the Czech and Slovak Federative Republic.

²⁹ Exactly: the Slovak Republic opened the Slovak market in 2004 to national operators and those of other member states offering private sickness insurance services. Achmea, an undertaking belonging to a Netherlands insurance group, after obtaining authorisation as a sickness insurance institution, set up a subsidiary in Slovakia to which it contributed capital and through which it offered private sickness insurance services on the Slovak market. But in 2006, the Slovak Republic partly reversed the liberalisation of the private sickness insurance market and prohibited the distribution of profits generated by private sickness insurance activities. Subsequently, after the Constitutional Court of the Slovak Republic held in a judgment of 26 January 2011 that the prohibition was contrary to the Slovak constitution, the Slovak Republic, through a law that entered into force on 1 August 2011, once more allowed the distribution of the profits in question.

the first place, the Bundesgerichtshof (Federal Court of Justice) doubted that Article 344 TFEU was even applicable and questioned whether Article 267 TFEU precluded an arbitration clause such as that at issue in the main proceedings³⁰.

The Court of Justice stated that “Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitration tribunal whose jurisdiction that Member State has undertaken to accept” (*Slovak Republic v. Achmea*, para. 60).

The court noted that resolution of the dispute in question required the interpretation and application of the law of the given state, as well as EU law, in particular concerning the freedom of establishment and free movement of capital (*Slovak Republic v. Achmea*, para. 42). It is the courts and tribunals of member states, in cooperation with the Court of Justice, that are competent to apply EU law. Only these courts and tribunals can make a reference for a preliminary ruling under Article 267 TFEU in all areas of EU law (*Slovak Republic v. Achmea*, para. 49). Arbitration tribunals provided for in BITs do not have such powers, because they cannot be treated as courts or tribunals of the member states.

Looking at the *Achmea* judgment, one should consider the consequences of this outcome and ask whether the *Achmea* case excluded all forms of intra-EU arbitration with a member state and what the implications of *Achmea* might be for an investor-state dispute settlement under BITs concluded by EU member states. It is key that the judgment discussed did not relate to commercial arbitration but rather to BIT procedures, and directly following the *Achmea* judgment it seemed that intra-EU investment arbitration had come to an end. The European Commission was convinced that the judgment was equal to a final win in the crusade against intra-EU treaties on support and protection of investments (BITs). However, judgments on investment arbitrations³¹ and legal doctrine are unequivocal. The *Achmea* judgment relates to the way the court addresses investment arbitration from the perspective of European Union law.

Here it is pertinent to mention the declaration of the European Commission issued to placate investors fearful of the legal consequences of the *Achmea* judgment. In its communication on protection of intra-EU investment (Communication from the Commission to the European Parliament and the Council: Protection of intra-EU investment, COM (2018) 547/2), the EU Commission explained, among other things, how the rights of investors are protected in the EU and the role of the EC in this matter. Furthermore, the Commission called to mind proceedings initiated against a few member states in the case of non-termination of such treaties, explained the meaning of the *Achmea* judgment in relations between EU member states and in those with third states. The communication makes clear reference to EU BITs, saying: “EU investors cannot invoke intra-EU BITs, which are incompatible with Union law and no longer necessary in the single market. They cannot have recourse to arbitration tribunals established by such intra-EU BITs or, for intra-EU litigation, to arbitration tribunals established under the Energy Charter Treaty. However, the EU legal system offers adequate and effective

³⁰ BGH decided to refer the following questions: “1. Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?:

2. Does Article 267 TFEU preclude the application of such a provision?

If Questions 1 and 2 are to be answered in the negative:

3. Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?”

³¹ In ref. to the *Vattenfall* case (ICSID Case No. ARB/12/12) and *Chèque Déjeuner* case (ICSID Case No. ARB/13/35).

protection for cross-border investors in the single market, while ensuring that other legitimate interests are duly and lawfully taken into account” (Communication: Protection of intra-EU investment, p. 26).

4.3. The impact of the Achmea judgment on the energy sector

The first question to answer is how the Achmea judgment affects investment and dispute settlement. Secondly, one should consider its impact on such settlements in the EU energy sector. Undoubtedly, the Achmea judgment of March 2018 affected the future of investment arbitration in the European Union. It should be considered whether arbitration between a state and an investor from another EU country would be at all a practical solution in view of the problematic execution of the judgment. One should keep in mind the possible implications of the Achmea judgment for investor-state dispute settlement under other types of international agreements entered into by EU member states with respect to large energy infrastructure projects (such as those for gas pipelines, LNG terminals and others).

To answer those questions, this text will analyse a case related to the energy sector settled by arbitral tribunal that occurred after the Achmea judgment. In the *Vattenfall v. Germany* case (ICSID Case No. ARB/12/12), the tribunal held that the Achmea decision does not affect their jurisdiction under the Energy Charter Treaty. On 31 August 2018, a decision on the Achmea dispute was published by the International Centre for Settlement of Investment Disputes in the *Vattenfall v. Germany* case. This decision is especially important in view of the fact that the proceeding between the five Swedish investors and Germany was initiated in 2012. In May 2012, Vattenfall brought an ICSID arbitral proceeding against Germany following the government’s decision to phase out nuclear energy (*Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12)). The company alleged that environmental restrictions in the phase-out law amounted to an expropriation under the ECT. In the Vattenfall case, Sweden’s Vattenfall group sued the Federal Republic of Germany for damages caused by the so-called German “*Energiewende*” (“energy turnaround”). According to Vattenfall, forcing investors to terminate the investment by 2022 was equivalent to expropriation of the investment and initiated arbitration proceedings under the ECT³².

It should be noted that the first jurisdiction of the Tribunal has been undermined by the European Commission. On issuing the Achmea judgment, the Arbitral Tribunal asked the parties to express their opinions³³. Despite the claimants’ submission that after such a period of time, the state no longer holds the right to object the jurisdiction (six years and 18 months passed)³⁴, the tribunal ruled that the Achmea judgment was a new circumstance in the understanding of the ICSID regulations.

The tribunal assessed the relevance of EU law and the Achmea judgment to determine its jurisdiction. In this award, the Arbitral Tribunal rejected the application of the Achmea judgment to the Vattenfall arbitration. The reasoning was that the Achmea decision was made with regard to a bilateral investment treaty between EU member states. It has been noted that the Achmea judgment does not address disputes under the ECT, of which the European Union itself is a member.

The tribunal based its ruling on two main arguments. Firstly, the arbiters pointed out that the ECT itself did not suffice in assessing the jurisdiction of the tribunal (pursuant to Article 26(6) of the ECT, tribunals adjudicate

³² More about the case: Peterson, L. E. (2015).

³³ On these points, the parties provided two rounds of comments: first, on 4 April 2018 (“Claimants’ First Submission re the ECJ Judgment” and “Respondent’s First Submission re the ECJ Judgment”, respectively); and second, on 23 April 2018 (“Claimants’ Second Submission re the ECJ Judgment” and “Respondent’s Second Submission re the ECJ Judgment”, respectively).

³⁴ According to par. 60 of the Decision on the *Achmea* Issue: Claimants submit that the jurisdictional objection raised by Respondent in its First Submission re the ECJ Judgment dated 4 April 2018 is belated, since it has been submitted for the first time six years after the proceedings were initiated and 18 months after the hearing.

following the provisions of the ECT and relevant standards and provisions of international law). According to the tribunal, both EU law and international law were applicable in the dispute. Keeping in mind the consistency of international law, it is unacceptable to apply EU law directly in a manner that would lead to fragmentation of the ECT rules, while the *Achmea* judgment did not include reference to further application of the ECT arbitration clause within the European Community (para. 187 of the Decision on the *Achmea* Issue).

Secondly, the tribunal determined that the ECT and EU law have different scopes of application, so there is no need to settle a dispute between these two – and even if their scopes of application overlapped, the provisions of the ECT were in this case more beneficial to the investors than EU law and thus, pursuant to Article 16 of the ECT, would take precedence³⁵. Based on this reasoning, the Arbitral Tribunal upheld the jurisdiction of the tribunal. At the same time, the tribunal did not settle doubts related to the enforceability of the arbitration judgment. Germany claimed that in the case of losing the arbitration proceedings, EU law would be detrimental to the enforcement of the judgment. However, the tribunal ruled that enforcement of the arbitration judgment was a separate issue, different to settlement of the essence of the dispute (and, at that stage, purely hypothetical), which is why it was not authorised to adjudicate in this scope. As a matter of fact, the *Vattenfall* arbitration is governed by ICSID rules, which have the special feature that the final award is enforceable by itself. State courts will not be involved in the further proceedings.

It should be noted that the *Vattenfall* decision demonstrates that there is hope for investment arbitrations. Analysis of this decision allows one to conclude that in cases in which the arbitration clause is not included in a bilateral investment treaty of an EU member state, but rather in a multilateral international treaty, the reasoning and argumentation presented in the *Achmea* judgment and by the European Commission do not apply.

Undoubtedly, the question of ECT-based arbitration remains open and discussions on the topic will continue.

Conclusions

It is undeniable that EU countries can only tackle the united energy market as an internal, united energy market followed by EU countries, its energy law and the Energy Charter Treaty. The pursuit of a stronger and more united European energy market involves enabling, encouraging and protecting investment. Analysis of the *Charanne* and *Eiser* cases demonstrates the complexity of problems involved in ensuring arbitration with regard to the Energy Charter Treaty.

The *Achmea* case (*Slovak Republic v. Achmea BV*) determined that investor-state arbitration clauses in BITs concluded between EU member states were incompatible with EU law. Directly following the *Achmea* judgment, it seemed that intra-EU investment arbitration had come to an end. The European Commission was convinced that the judgment constituted a final win in the crusade against intra-EU BITs. The paper also presented a case relating to the energy sector settled by an arbitral tribunal after the *Achmea* judgment. In the case of *Vattenfall v. Germany*, however, the tribunal held that the *Achmea* decision did not affect its jurisdiction under the Energy Charter Treaty.

Undoubtedly, the *Achmea* judgment of March 2018 affected the future of investment arbitration in the European Union. According to this judgment and the European Commission communication that intra-EU BITs are

³⁵ According to Article 16 of the ECT: Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.

incompatible with union law and numerous doubts about the admissibility of arbitration on the basis of the ECT, clarification or changes in the provisions of the ECT should be considered. The issue of possible modernisation was discussed during the Energy Charter Conference in November 2017 in Ashgabat (<http://www.energyashgabat2017.gov.tm/en>). This modernisation should certainly include issues related to international investment law.

References

- Calliess, C., Ruffert, M. (ed.) (2007). *Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtcharta - Kommentar*. Munich: C. H. Beck.
- Charanne v. Spain (SCC Case No. 062/2012). Available at: https://www.transnational-dispute-management.com/downloads/15994-case_report_charanne-v-spain-award.pdf; Translation by Mena Chambers.
- Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment, COM (2018) 547/2. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A547%3AFIN>.
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy infrastructure priorities for 2020 and beyond - A Blueprint for an integrated European energy network. 2010, COM(2010) 677. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010SC1395&from=EN>.
- Energy Charter Conference, Turkmenistan's Chairmanship, Ashgabat (2017). Available at: <http://www.energyashgabat2017.gov.tm/en>.
- European Council conclusion of 4 February 2011, EUCO 2/1/11. Available at: <https://ec.europa.eu/research/era/docs/en/brussels-european-council-4-february-2011-presidency-conclusions.pdf>.
- Geigner R., Khan, D.-E., Kotzur M. (2010). *Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union*-Kommentar, 5 Aufl. Munich: C. H. Beck.
- ICSID Case No. ARB/12/12. Available at: <https://www.italaw.com/cases/1654>.
- ICSID Case No. ARB/13/35. Available at: <https://www.italaw.com/cases/6902>.
- ICSID Case No. ARB/13/36. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>
- Information from the Energy Charter Process. Energy Charter Secretariat (2015). Available at: http://www.energycharter.org/fileadmin/DocumentsMedia/Infographics/2015_Energy_Charter_Process_General.pdf.
- International Energy Charter – Agreed text for adoption in The Hague at the Ministerial Conference on the International Energy Charter on 20 May 2015. Available at: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf.
- Jaś, M. (2011). Transeuropejskie sieci energetyczne programem wzmacniającym spójność gospodarczą, [in:] *Europeizacja publicznego prawa gospodarczego*, Gronkiewicz-Waltz, H., Jaroszyński, K. (ed.). Warsaw: C.H. Beck, 251-262.
- Nowacki, M. (2010). *Prawne aspekty bezpieczeństwa energetycznego w UE*. Warsaw: Wolters Kluwer Polska SA.
- Nowacki, M. (2012). [in:] *Traktat o funkcjonowaniu Unii Europejskiej. Commentary. Tom II (art. 90-222)*, A. Wróbel (ed.), Warsaw: Wolters Kluwer Polska.
- Nowak, B. (2009). *Wewnętrzny rynek energii w Unii Europejskiej*. Warsaw: C.H. Beck.
- Opinion of CJEU Advocate General Wathelet (2017). Available at:
- Parola, L., Petronio, F., Cozzi, F. (2015). Italy's Withdrawal from the Energy Charter Treaty: Which Consequences for Foreign Investors? Available at: <https://www.paulhastings.com/docs/default-source/PDFs/stay-current-italy-39-s-withdrawal-from-the-energy-charter-treaty.pdf>
- Peterson, L.E. (2015). "Germany's openness to ISDS transparency and the Vattenfall arbitration", *Investment Arbitration Report*, 2 June 2015. Available at: <https://www.iareporter.com/articles/germanys-openness-to-isds-transparency-and-the-vattenfall-arbitration/>
- Restrepo, T. (2018). Modification of Renewable Energy Support Schemes Under the Energy Charter Treaty: Eiser and Charanne in the Context of Climate Change, *Goettingen Journal of International Law*. 8 (1), 101-137.
- Simoes, F.D. (2017). Case Note Charanne and Construction Investments v. Spain: Legitimate Expectations and Investments in Renewable Energy, *Review of European. Comparative & International Environmental Law*, 26 (2), 174-180.
- The International Energy Charter Consolidated Energy Charter Treaty with Related Documents. Last Update: January 2016. Available at: <http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>
- Tönurist, P., Besten, D., Xinhui, Yu P., Paplaityte, D. (2015). Market Liberalization and Innovation in the Energy Sector: The Case of Belgium and the Netherlands. *Administrative Culture*, 16 (2), 83-116.
- Wróbel A. (ed.), (2012). *Traktat o funkcjonowaniu Unii Europejskiej. Commentary. Tom II (art. 90-222)*, Warsaw: Wolters Kluwer Polska.

